SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ROADWAY EXPRESS, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From The United States District Court For The District Of Delaware

MOTION OF MOTOR CARRIER APPELLEES TO AFFIRM

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IN THE

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OCTOBER TERM, 1962

No. 1149

ROADWAY EXPRESS, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From The United States District Court For The District Of Delaware

MOTION OF MOTOR CARRIER APPELLEES TO AFFIRM

Pursuant to Rule 16 paragraph 1(c) of the Revised Rules of this Court, the motor carrier appellees, National Tank Truck Carriers, Inc.; Chemical Leaman Tank Lines, Inc.; E. Brooke Matlack, Inc.; Hearin Tank Lines, Incorporated; Highway Transport, Inc.; Lemmon Transport Co., Inc.; Liquid Transporters, Inc.; and P. B. Mutrie Motor Transportation, Inc., all of whom were intervenor-defendants in the court proceeding below, move that the judgment of the district court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered February 4, 1963, by a district court of three judges specially constituted pursuant to 28 U.S.C. §2284 and §2325, dismissing appellants' complaint which sought to set aside orders of the Interstate Commerce Commission.[1]

The Interstate Commerce Commission reports and orders under review[2] were entered after extensive hearings in disposition of extension-of-service applications filed by numerous motor carriers, including the motor-carrier appellants,[3] under §206(b) of the Interstate Commerce Act (49 U.S.C. §306(b)). The applicants hold operating authorities to transport "general commodities" over specified routes and within specified territories restricted against "commodities in bulk and those requiring special equipment." They sought from the Commission additional authority to transport, within the same geographical limits, liquid and dry-flowable commodities in certain newly-developed rubber containers, hereinafter referred to as Sealdtanks or as C & S containers, ranging in size up to

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[1] The opinion of the District Court is reported at 213 F.Supp. 868.

[2] *Western Express Company Extension—Sealdtanks,* 84 M.C.C. 585 (J.S. 32a *et seq*) and *Best Way of Indiana, Inc., Extension—Containers,* 86 M.C.C. 61 (J.S. 81a *et seq*).

[3] There were 14 applicants in the *Western* case. Those applicants included three of the appellants herein, *i.e.*, Roadway Express, Inc., All States Freight, Incorporated, and Terminal Transport, Inc. There were 211 applicants in the *Best Way* case. Those applicants included three of the appellants herein, namely, Transamerican Freight Lines, Inc., Eastern Express, Inc., and Overnite Transportation Company. The decisions of the Commission have been accepted by 219 of the applicants involved in the cases under review.

38 feet long and in capacity to 4,400 gallons.[4] The customary method of using Sealdtanks in transporting liquids is to place the containers, when empty, on a flat bed or van type trailer, load them through a hose or a pipe just as in the case of any tank-type container, transport them over the road while tied down to the bed of the vehicle, and collapse them when being returned empty after being emptied from the vehicle at destination. In transporting dry-flowables in C & S containers, the containers are usually filled prior to placement on the carrier's vehicle.[5] The applications were accompanied by requests that the Commission interpret applicants' existing general-commodity certificates (restricted as above stated) to include the transportation sought by the extension applications and, by motions to dismiss such applications on that ground.[6] Numerous motor carriers authorized to transport commodities in bulk in tank vehicles, including these appellees, intervened and presented evidence in opposition to the applicants.

The Commission resolved the question of certificate interpretation by finding that transportation in Sealdtanks and other C & S containers constituted transportation of commodities "in bulk requiring special equipment" whenever the liquid or dry-flowables were poured into or out of the containers *while on the over-the-road vehicles.* However, when this pouring into the containers took place off the vehicle before the goods were tendered to the carrier for

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[4] J.S. 104a. Sealdtanks are designed to transport only liquid commodities. C & S containers designed to transport dry-flowables (such as Sealdbins), have capacities ranging up to 300 cubic feet (J.S. 105a).

[5] J.S. 36a-38a, 91a.

[6] J.S. 35a and 83a-84a.

transportation, the transportation service was found to be within the authority of the general commodity carriers.[7] This interpretation was found to govern irrespective of whether the containers in question were owned and furnished by shippers or owned and furnished by carriers.[8]

On the question of extended operating authority for the future, the Commission dismissed all applications on the ground that the evidence failed to show that the present and future public convenience and necessity required any of the proposed operations which exceeded the scope of the operating authorities presently held by the applicants as interpreted by the Commission.[9]

The appellants brought this action in the United States District Court for the District of Delaware seeking to have the reports and orders of the Commission set aside, but *only* as applied to transportation services when performed in *shipper-supplied* Sealdtanks and other C & S containers. The District Court dismissed the complaint.[10] One judge dissented on the ground that the Commission's reports were unclear as to whether it considered and properly applied the National Transportation Policy, and, for that reason, there should be a remand.[11]

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[7] J.S. 54a-59a and 84a-85a.

[8] J.S. 57a.

[9] J.S. 60a and 103a.

[10] J.S. 10a-18a.

[11] J.S. 20a-29a.

QUESTIONS PRESENTED

The questions presented as phrased by appellants (J.S. 5-6) tend to obscure the legal questions of the Commission's power and authority on which this case must turn. As we read the Jurisdictional Statement, the questions presented which come within the scope of judicial review may be simply and fairly stated as follows:

1. Are the Commission's ultimate conclusions and orders on the issue of certificate interpretation so clearly irrational, erroneous and arbitrary as to require that its reports and orders be set aside upon judicial review?

2. Are the Commission's reports deficient in that they fail to show that the mandates of the National Transportation Policy were considered by the Commission in reaching its conclusions as to certificate interpretation?

3. Are the orders of the Commission which deny appellants' applications for extended operating authority deficient because not supported by adequate findings or otherwise contrary to law?

ARGUMENT

1. On the question of the rationality of the Commission's interpretation of existing certificates, the decision of the district court is plainly correct.

The Commission could settle the issue of certificate interpretation only by defining the line of demarcation between tank-truck service (transportation of commodities in bulk and in special equipment) and general commodity-carrier service (restricted against the transportation of commodities in bulk or those requiring special equipment). As a trier of the facts with special competence in the field of transportation, the Commission concluded that when liquid or dry flowable commodities are poured, pumped, dumped, etc., into carrier-supplied or shipper-supplied Sealdtanks or other C&S containers premounted on a trailer, even of the conventional type, "the aggregate of facilities provided constituted a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle; and, like such vehicles, the unit in question clearly falls within the category of 'special equipment'."[12] That the inference so drawn is reasonable and not arbitrary, would seem to be beyond dispute. Only when transportation in the involved containers is handled in the same manner as a package of goods—tendered to and received from the carrier in a filled condition—did the Commission conclude that the services were not beyond those authorized by general commodity certificates restricted against the transportation of commodities in bulk or those requiring

[12] J.S. 56a.

special equipment.[13] While these appellees contended before the Commission that transportation when performed under the latter conditions constituted, both in fact and in law, transportation of commodities in bulk and in special equipment, they accepted this phase of the Commission's line of demarcation as a reasonable judgment by an informed and expert administrative agency. Even though the Commission's conclusion can be termed a compromise, it is nonetheless supported on both sides by reason founded on an understanding of the facts of transportation.

In the *Western Express* case, Commissioner Webb, in his dissenting-in-part opinion, acknowledged that the construction accorded the certificates by the majority was "reasonable" and "not patently unsound." (J.S. 61a). No

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[13] The basis for this differentiation was summarized as follows in the *Western* case (J.S. 54a).

> "On the specific question as to whether C & S container transportation belongs within one or the other basic field of service, we think it clear that by its nature such transportation falls exclusively within neither field and should not arbitrarily be so confined. In the past when general freight carriers have transported fungible, flowable commodities, those commodities have been contained or packaged by the shipper—in bags, drums, hogsheads, and the like—prior to tender of the shipment to the carrier. This is the type of transportation service discussed in the *Langdon* case, *supra*, referred to by applicants. On the other hand, shippers of fungible, flowable commodities have been able to offer their traffic to tank truckers without the necessity of having to package it beforehand; it has been necessary for such a shipper merely to pump or pour the commodity directly into the vehicle in which it will be transported. See *Whitfield Transp., Inc.* v. *Solis*, 83 M.C.C. 25. This distinction between packaged and bulk service is basic and is clearly discernible in present and prospective uses of C & S containers. No justification has been shown for applying a different rule or for establishing, arbitrarily, a new one for differentiating between the two types of service in connection with the movement of flowable commodities in C & S containers on ordinary equipment."

more is required of Commission action against the claim of irrationality and arbitrariness. The dissenting district judge did not question the rationality of the Commission's orders, but only its articulation of the consideration given to the National Transportation Policy, a separate and distinct matter dealt with under point 2, *infra*.

Appellants themselves do not question the rationality of the Commission's ruling as applied to Sealdtanks, etc., when supplied by carriers. The self-imposed limitation of their attack on the Commission's order, to services performed in *shipper-supplied* Sealdtanks, etc., is a strong indication of how unsubstantial is the question presented as to the rationality of the order. A particular piece of apparatus has the same utility whether carrier-owned or shipped-owned. If a Sealdtank is a transportation facility when carrier-owned, a proposition not disputed by appellants, it is no less a transportation facility when shipped-owned and supplied.[14]

The specific grounds on which appellants challenge the rationality of the Commission's interpretation are not set forth with particularity in their argument, although implied in their Questions 2 and 3. Their point seems to be that when the shipper supplies the C & S containers and the carrier supplies only an ordinary highway trailer, to which the container is affixed and then filled by the shipper, the Commission's order is irrational because the effect thereof is to "convert" the ordinary highway equipment

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[14] The Commission has so held in the case of rigid tank truck vehicles, *Transport Motor Exp., Inc., Ext.-Lacquers and Paints*, 53 M.C.C. 267 (1951), cited by the Commission in its report in the *Western Express Co.* case (J.S. 52a).

into a tank-truck (J.S. 6). The district court accepted appellants' version of what the Commission "held", and ruled that the "temporary conversion" is supported by "cogent reasons" stated in the report, as well as consistent with the relationship of any operating authority to a carrier's legal right to perform a particular transportation service (J.S. 11a-13a).[15] Nothing said by appellants casts doubt on the validity of the views expressed by the district court on this point.

2. On the question of whether Commission gave consideration to the mandates of the National Transportation Policy in promulgating its interpretation of certificates, the decision of the district court is clearly correct.[16]

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[15] The lower court could have sustained the orders against this claim of an irrational and arbitrary "conversion" on the ground that the Commission did not, in fact, "hold" that there was a "conversion" of equipment from one type to another, dependent on the method and time of loading the C & S containers. The Commission did no more than use the method and time of loading by the shipper as a guidepost to the *character* of the transportation services held out by the carrier to and performed for shippers. The same guideposts are recognized as providing the distinction between the holding out and performance of a tank-truck service and the holding out and performance of a package service. The suggestion that the Commission's use of these guideposts in its interpretation in this case constitutes a "holding" than an ordinary highway trailer is converted to a tank truck is an exercise in semantics, not an appeal to reason.

[16] The appellants in framing their Question 1 relating to the National Transportation Policy, and in arguing with respect to the duty of the Commission in this case under that Policy, seemed to contend that it was the duty of the Commission to enlarge by interpretation general commodity certificates (restricted as herein stated), beyond the bounds reasonably warranted by the terms of the certificates if such enlargement would improve the economy and efficiency

When it appears that such consideration was given, the reviewing court has no further need for inquiry, inasmuch as the weight to be given the evidence and the conclusions of fact to be drawn therefrom are matters exclusively com-

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of service or would tend to result in reduced rates for services rendered in Sealdtanks or other C & S containers. It is unnecessary to consider the narrow question of duty implicit in this contention since the factual premises on which it must proceed are lacking. This is because the assertions of fact in the lettered sub-paragraphs under applicants' Question 1 and on page 12 of the Jurisdictional Statement are not facts found by the Commission in the terms used by the appellants. Nor did the Commission express conclusions by way of inferences drawn from the evidence in the tone and tenor of applicants' recitals. Appellants did not choose to make the complete record of the hearing before the Commission a part of the record in the district court. Consequently, appellants may not now rest on any assertion of fact or factual inference other than those contained in the Commission's findings in its report. Furthermore, such findings must be accepted as in accordance with the evidence and as all that are required by the evidence. *Lubetich* v. *United States*, 315 U.S. 57 (1942); *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282 (1934); *Chicago I. & L. R. Co.* v. *United States*, 270 U.S. 287 (1926); *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U.S. 143 (1923). Even if the record provided the necessary factual support for appellants' contentions on this point, the authorities indicate that the duty of the Commission in interpretating certificates is properly performed when it accords the terms used in certificates such meaning as is reasonable in the light of the transportation facts involved. See, *e.g. Union Cartage Company* v. *United States*, 193 F. Supp. 645, 646-47 (D. Mass. 1961), *aff'd per curiam*, 368 U.S. 143 (1961); *Burlington-Chicago Cartage, Inc.* v. *United States*, 178 F. Supp. 857, 862 (S.D. Ill. 1959), *aff'd per curiam*, 362 U.S. 401 (1960); *Pomprowitz* v. *United States*, 119 F. Supp. 824, 827 (E.D. Wis. 1954), *aff'd per curiam*, 348 U.S. 803 (1954); *Brady Transfer and Storage Co.* v. *United States*, 80 F. Supp. 110, 118 (S.D. Iowa C.D. 1948) *aff'd per curiam* 335 U.S. 875 (1948), sustaining an

mitted to the judgment of the administrative agency.[17] While the cases cited in note 17 below involve questions as to the lawfulness of rates, the distinctions there drawn between what is exclusively a matter for the Commission and what is open on judicial review are equally applicable in cases involving interpretations of operating authorities.

That the Commission did give consideration to the National Transportation Policy is found in the very basis of the argument presented by appellants. That is to say, the test of the sufficiency of the Commission's consideration must be found on the face of the report (cases cited in note 16, *supra*), so that if appellants have a basis for claiming this or that with respect to either the efficiency and economy of the transportation or with respect to the reasonableness of rates, the very existence of that basis is the proof that consideration was given thereto by the Commission in reaching its conclusions. The report shows on its face that the various matter alleged by appellants

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interpretation order in *Transportation Activities of Brady Transfer and Storage Company*, 47 M.C.C. 23, 39-40 (1947), in which the Commission held in effect that an alleged destruction of progress, individual development, and contrariness to the public interest and the National Transportation Policy gives the Commission no warwant for expanding, through interpretation, the scope of a restricted certificate; *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954); *Arrowhead Freight Lines* v. *United States*, 115 F. Supp. 537 (S.D. Calif. 1953); *Arrowhead Freight Lines* v. *United States*, 114 F. Supp. 804 (S.D. Calif. 1953).

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[17] *New York* v. *United States*, 331 U.S. 284, 347 (1947); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593 (1949); *Barringer & Co.* v. *United States*, 319 U.S. 1, 7 (1943); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 at 352-3 (1940); *Virginian R. Co.* v. *United States*, 272 U.S. 658, 663 (1926); and *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 286 (1924).

to be relevant under the National Transportation Policy were taken note of.

The fact that the Commission reached the conclusions it did in the face of appellants' claims as to the effect of one interpretation or the other on efficiency and economy of transportation and upon the reasonableness of rates, is in itself the necessary demonstration that it considered these mandates in the National Transportation Policy and found them no barrier to the interpretation enunciated. *Luckenbach S. S. Co., Inc.* v. *United States*, 122 F. Supp. 824, (1954), *aff'd per curiam* 347 U.S. 984 (1954).

Furthermore, the characterization of the Commission's conclusions as a "compromise" (J.S. 18, note 18) is really only another way of saying that it did, in fact, balance the factors to be observed and weighed under the National Transportation Policy. It is that weighing and balancing which led it to interpret the involved certificates so that the general commodity carriers and tank-truck carriers would each be authorized to conduct transportation in C & S containers consistent with their usual mode of transportation, and without infringement of the rights of other carriers. No more was required of the Commission and appellants' contentions to the contrary raise no substantial question.

3. Whether applicants seek to present a separate and distinct question as to the validity of the orders insofar as they deny the appellants' applications for extension of operating authorities, is not clear from their Jurisdictional Statement; nevertheless we have stated the question above.

The duty and the power of the Commission to grant a new or extended operating authority is conditioned upon the entry by it of a finding that the authority sought "is or will be required by the present or future public convenience and necessity." (49 U.S.C. §307(a)) That condition necessarily runs to a specific carrier-applicant and

to a particular proposed service. If there is a deficiency in existing services, that must be shown as to a particular transportation service before new authority is authorized to meet an unfilled need. There is no finding in the Commission's report to the effect that any shipper on any of the routes served by appellants has requested in vain a Sealdtank or other C & S service from tank-truck carriers. There are repeated references to the fact that tank-truck carriers are willing and able to supply any service authorized by their certificates for which shippers have need. (J.S. 43a, 49a, 98a, and 103a) There are findings that services requested by shippers in premounted Sealdtanks are being presently rendered by tank-truck carriers. (J.S. 49a, 98a) Upon a weighing of the evidence, the Commission held in categorical terms that the evidence would not support a finding as to unfilled needs for any of the services in Sealdtanks or other C & S containers proposed by any one of the 200-plus applicants involved in the Commission proceedings.[18]

Appellants did not make the complete record of the hearings before the Commission a part of the record in the lower court. Consequently, the Commission's findings of fact that the evidence failed to establish that the present or future public convenience and necessity require any of the proposed operations which exceed the scope of the appellants' presently held rights must be accepted as in accordance with the evidence.[19] There is no requirement in the National Transportation Policy which enlarges the power and the duty of the Commission under 49 U.S.C. 307(d) so as to compel it to grant a new operating authority in the absence of proof of a need for a service which existing carriers are either unable or unwilling to fulfill.

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[18] 84 M.C.C. at 603-04; 86 M.C.C. at 75-76; J.S. 58a-59a and 101a-103a.

[19] First group of cases cited in note 16, pp. 9-10, *supra*.

The contention that the Commission on the record before it should have found as to each and every point and route through the United States served by more than 200 general-commodity motor carriers that there was a need for the additional services not embraced within the applicants' existing certificates, and that carriers with certificates authorizing such services were unable or unwilling to perform it is no less than fantastic. It would have been the rankest departure from established Commission precedent had the Commission given wholesale authority to all general-commodity carriers without a showing of specific, unfulfilled needs.

It follows that the Commission's denial of the applications for extended operating authority presents no substantial question for the decision of this Court.

CONCLUSION

We, therefore, respectfully submit that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Nuel D. Belnap, Attorney for Appellees, National Tank Truck Carriers, Inc.; Chemical Leaman Tank Lines, Inc.; E. Brooke Matlack, Inc.; Hearin Tank Lines, Incorporated; Highway Transport, Inc.; Lemmon Transport Co., Inc.; Liquid Transporters, Inc.; P. B. Mutrie Motor Transportation, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of June, 1963, I served copies of the foregoing Motion to Affirm of said Appellees on the several parties by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, as follows:

(1) On the Appellants, Roadway Express, Inc.; All States Freight, Inc.; Terminal Transport, Inc.; Transamerican Freight Lines, Inc.; Eastern Express, Inc.; Overnite Transportation Company, United States Rubber Company, copies to their attorneys, John C. Bradley, Esq., and Homer S. Carpenter, Esq., 618 Perpetual Building, Washington 4, D. C.; Howell Ellis, Esq., 616-618 Fidelity Building, 111 Monument Circle, Indianapolis 4, Indiana, and, Messrs. Arthur, Dry, Kulesh & Wood, 1230 Sixth Avenue, Rockefeller Center, New York 20, New York.

(2) On the United States of America, Appellee, copies to the Honorable Archibald Cox, Solicitor General of the United States, William H. Orrick, Jr., Assistant Attorney General, Robert B. Hummel and Colin A. Smith, Attorneys, Department of Justice, Washington 25, D. C.

(3) On the Interstate Commerce Commission, Appellee, copies to Robert W. Ginnane, Esq., its General Counsel and Robert S. Burk, Attorney, Washington 25, D. C.

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